FILED
APR 15 2011

No. 10-768

In the
Supreme Court of the United States

AFTERMATH RECORDS (D/B/A AFTERMATH ENTERTAINMENT), INTERSCOPE RECORDS, UMG RECORDINGS, INC.,

Petitioners,

v.

F.B.T. PRODUCTIONS, LLC, EM2M, LLC,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR REHEARING

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April 15, 2011

CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44.2, petitioners respectfully petition for rehearing of the Court's March 21, 2011 order denying the petition for certiorari. Petitioners request that the Court grant rehearing for the purpose of granting the petition for certiorari, vacating the court of appeals' judgment, and remanding for further consideration in light of this Court's January 24, 2011 decision in No. 09-737, *Ortiz v. Jordan*, 131 S. Ct. 884.

GROUNDS FOR REHEARING

In *Ortiz*, this Court considered the question "whether a party may appeal a denial of summary judgment after a district court has conducted a full trial on the merits." 131 S. Ct. at 891. The "answer is no." *Id.* at 889. The Ninth Circuit's decision in this case squarely held the opposite: "We may therefore review the district court's denial of summary judgment despite full trial on the merits." Pet. App. 8a. Petitioners respectfully submit that rehearing is justified because these seemingly irreconcilable holdings present a compelling case for a GVR in light of *Ortiz*, and post-*Ortiz* decisions of the courts of appeals not previously presented to this Court underscore that the decision below cannot be reconciled with *Ortiz*.

1. The suit underlying this petition concerns the appropriate calculation of royalties from online sales of songs by popular recording artist Eminem. The key substantive issue at summary judgment, at trial, and on appeal was which of two royalty provisions in the parties' contract applied to sales of permanent downloads. Petitioners contended that permanent

downloads were covered by the contract's general royalty provision for sales through normal retail channels. Respondents contended that the contract's higher royalty rate for "Masters Licensed" applied. Both sides moved for summary judgment, each relying on evidence of industry practice to support its interpretation of the contract. *See* Pet. 2-5.

The district court denied both sides' motions for summary judgment because it found that "the parties' conflicting evidence create[d] a triable issue of fact." Pet. App. 47a. The parties then presented their conflicting evidence at trial. Respondents did not move for judgment as a matter of law, either before or after the case went to the jury. The jury found that petitioners' interpretation was correct. Having failed to move for judgment as a matter of law under Fed. R. Civ. P. 50, respondents could not challenge the denial of that relief on appeal. *Cf. Unitherm Food Sys., Inc. v. Swift-Eckrich, Inc.*, 546 U.S. 394 (2006). Respondents thus eventually told the Ninth Circuit that they were "really appealing from the denial of summary judgment." *See* Pet. 9.

Before *Ortiz*, the Ninth Circuit had held that the denial of summary judgment could be appealed under some circumstances after a jury trial on the merits. *See, e.g., Banuelos v. Constr. Laborers' Trust Funds for S. Cal.*, 382 F.3d 897, 902 (9th Cir. 2004). Applying that circuit precedent, the court of appeals held that respondents' failure to file a Rule 50 motion did not matter and that it could consider their contract interpretation argument as an appeal from the denial of their summary judgment motion and reversed the jury verdict. *See* Pet. App. 5a-8a.

The decision below and *Ortiz* therefore appear to be irreconcilable. The decision below explicitly permitted a post-trial appeal of a denial of a summary judgment motion: "A district court's denial of summary judgment is subject to review on appeal, despite full trial on the merits, 'where the district court made an error of law that, if not made, would have required the district court to grant the motion.'" Pet. App. 6a (quoting *Banuelos*, *supra*). While this petition was pending, this Court held in *Ortiz* that such an order is not appealable after trial. *See Ortiz*, 131 S. Ct. at 889 (answering "no" to the question whether a party may "appeal an order denying summary judgment after a full trial on the merits"). If *Ortiz*'s holding that the denial of summary judgment may not be appealed after a jury trial on the merits states a general rule applicable across the spectrum of civil cases, rather than a rule limited to the qualified-immunity context with its unique set of rules for interlocutory appeals, then the decision below would squarely conflict with *Ortiz* and a GVR would appear to be plainly warranted.

2. The conflict between *Ortiz* and the decision below is sufficiently stark that petitioners can only surmise that the Court denied the petition in this case, rather than issuing a GVR, based on a view that *Ortiz* is limited to the qualified-immunity context. Nothing in *Ortiz* suggests that it is so limited, however, and even respondents did not argue against a GVR on such a ground. Now, moreover, the Ninth Circuit itself has applied *Ortiz* outside the qualified-immunity context.

In an opinion issued after petitioners filed their reply, the Ninth Circuit held that the district court's

denial of a motion for summary judgment was not appealable, citing *Ortiz* for the proposition that, after a trial, the denial of summary judgment "is not reviewable on appeal." *See McCollough v. Johnson, Rodenburg & Lauinger, LLC*, __ F.3d __, 2011 WL 746892, *12 n.4 (9th Cir. Mar. 4, 2011). *McCollough* had nothing to do with qualified immunity; it involved a claim under the Fair Debt Collection Practices Act and related state-law claims for malicious prosecution and abuse of process. The opinion, joined by Justice O'Connor, held that the court of appeals' review was limited to the denial of the defendants' motion for judgment as a matter of law, and it relied exclusively on *Ortiz* for that proposition. *Id.*

Just a few weeks earlier, in stark contrast, the Ninth Circuit had applied its decision in this case in a way that makes crystal clear that the rule that the court applied in the decision below was entrenched as circuit precedent — until *Ortiz*. *See First Nat'l Mortgage Co. v. Fed. Realty Inv. Trust*, 631 F.3d 1058, 1064-65 (9th Cir. Feb. 1, 2011).[1] *First*

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[1] In *First National*, *id.*, the Ninth Circuit relied on the decision below explicitly and heavily for the proposition that the denial of summary judgment is appealable after trial:

> At the outset, we reject First National's argument that because there was a full trial on the merits, Federal Realty is precluded from challenging the district court's denial of its motions for summary judgment. *See F.B.T. Prods., LLC v. Aftermath Records*, 621 F.3d 958, 963 (9th Cir. 2010) ("A district court's denial of summary judgment is subject to review on appeal, despite full trial on the merits, 'where the district court made an error of law that, if not made, would

National demonstrates that the decision below was not somehow case-specific or idiosyncratic in the pre-*Ortiz* world.[2] And the Ninth Circuit's intervening decision in *McCollough* demonstrates that *Ortiz* has superseded the decision below as the applicable law in the Ninth Circuit. Moreover, *McCollough* underscores that at least one panel of the Ninth Circuit, in what is now circuit law in the post-*Ortiz* world, does not read *Ortiz* as limited to the qualified-immunity context. As a result, there is no rational reason not to GVR this case to allow the court of appeals to apply *Ortiz* to this case in the same manner it is applying *Ortiz* in other cases.

3. Petitioners submit that the Ninth Circuit in *McCollough* was clearly correct in interpreting *Ortiz* as not limited to the qualified-immunity context.

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have required the district court to grant the motion.'" (citation omitted)). Moreover, to preserve this issue for appeal, Federal Realty did not have to present it in a motion for judgment as a matter of law. *See id.* at 962-63 (holding that an issue of law that "does not rest on the sufficiency of the evidence to support the jury's verdict" need not be raised in a motion for judgment as a matter of law to preserve the issue for appeal). Rather, all Federal Realty had to do was "raise the argument at some point before the judge submitted the case to the jury," which it did. *See id.* at 963. Accordingly, the district court's determinations that portions of the Final Proposal were ambiguous are "'question[s] of law, subject to independent review on appeal.'" *See id.* (citation omitted).

[2] *First National* was decided one week after *Ortiz*, but the Ninth Circuit did not cite *Ortiz*, and it appears that the parties did not bring *Ortiz* to the Ninth Circuit's attention in that very short intervening time period.

Nothing in this Court's opinion suggests such a limitation.

When the Court described the question presented at the outset of the opinion, the Court did so in generally applicable terms and did not mention qualified immunity: "We granted review . . . to decide a threshold question on which the Circuits are split: May a party, as the Sixth Circuit believed, appeal an order denying summary judgment after a full trial on the merits? Our answer is no." 131 S. Ct. at 888-89 (footnote omitted). The Court then justified that conclusion in generally applicable terms as well, explaining that "[t]he order retains its interlocutory character as simply a step along the route to final judgment." *See id.* at 889. And for that proposition, the Court cited a case involving a stockholder derivative action — not a qualified-immunity case. *See id.* (citing *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)). When the Court restated the question presented, it again did not suggest that it was in any way limited to the qualified-immunity context: "We granted certiorari to resolve the conflict among the Circuits as to whether a party may appeal a denial of summary judgment after a district court has conducted a full trial on the merits." *Id.* at 891.

Nor does Justice Thomas's opinion concurring in the judgment, joined by Justice Scalia and Justice Kennedy, suggest such a limitation. *See* 131 S. Ct. at 893 ("We granted certiorari to decide the narrow question whether a party may appeal an order denying summary judgment after a full trial on the merits. I agree with the Court that the answer is no."). The merits briefs and oral argument likewise

made clear that the question in *Ortiz* did not turn on procedural rules unique to qualified immunity. *See* Pet. 14-15. Indeed, even respondents did not oppose a GVR on such a ground.

Nonetheless, at least one circuit has arguably suggested (in a decision post-dating the denial of the petition here) that *Ortiz* is limited to the qualified-immunity context. *See Rubin v. Peterson*, __ F.3d __, 2011 WL 1125556, *7 n.9 (7th Cir. Mar. 29, 2011) (describing *Ortiz* in terms specific to qualified immunity). That aspect of *Rubin*, unlike *McCollough*'s reliance on *Ortiz*, is only dictum.[3]

But the critical point is not whether *Rubin* or *McCollough* reflects the better view. Whether *Ortiz* contains such a limitation is a question that should be and will be worked out by the lower courts in the first instance. The critical point is that there is no reason that this case should not be part of the process of the lower courts working this question out. Even if *Ortiz* does not make clear that its holding applies beyond the qualified-immunity

[3] *Rubin* held that an order denying immunity under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330(a), 1602-1611, that could have been, but was not, immediately appealed, could be appealed as part of an appeal of a subsequent order where the first order had not been mooted or superseded by the subsequent proceedings. 2011 WL 1125556, at *5-7. The court explained that in *Ortiz*, in contrast, the denial of summary judgment could not be appealed after trial because the qualified-immunity defense had to be renewed and litigated at trial. *Id.* at *7 n.9; *see also Ortiz*, 131 S. Ct. at 889 ("Once the case proceeds to trial, the full record developed in court supersedes the record existing at the time of the summary judgment motion.").

context, it certainly does not clearly foreclose that result, as evidenced by the Ninth Circuit's holding in *McCollough*. Accordingly, this is not a situation where the result of the lower court's reconsideration on remand is foreordained such that a GVR would serve no purpose.

At bottom, the question presented by this rehearing petition is whether petitioners and this case should be excluded as the lower courts grapple with *Ortiz*. Especially now that the court below has applied *Ortiz* outside the qualified-immunity context, there is no justification for excluding petitioners. This Court should GVR this case so the Ninth Circuit can give careful consideration to whether, as its decision in *McCollough* strongly suggests, it believes its holding in the decision below does not survive *Ortiz*. Petitioners respectfully submit that the unusual circumstances here make rehearing appropriate.

CONCLUSION

The Court should grant the petition for rehearing and grant the petition for certiorari, vacate the Ninth Circuit's judgment, and remand for reconsideration in light of *Ortiz*.

Respectfully submitted,

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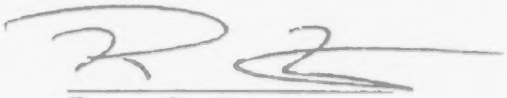
CERTIFICATE OF COUNSEL

This petition is restricted to the grounds identified in Sup. Ct. R. 44.2. This petition is presented in good faith and not for delay.



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